MICHIGAN LAW REVIEW

PUBLISHED MONTHLY DURING THE ACADEMIC YEAR, EXCLUSIVE OF OCTOBER, BY THE

LAW FACULTY OF THE UNIVERSITY OF MICHIGAN

SUBSCRIPTION PRICE $2.50 PER YEAR. **35 CENTS PER NUMBER**

NOTE AND COMMENT

THE APPAM CASE.—On March 6 last the Supreme Court handed down a unanimous decision in the appeals taken in the libel suits filed against the *Appam* and cargo in the District Court of the United States for the Eastern District of Virginia, affirming the decree of restitution entered by that court.

On February 1, 1916, the *Appam*, a British merchantman captured upon the high seas on January 15 by the German cruiser *Moewe*, arrived in charge of a prize master and crew at Hampton Roads, Virginia, after a voyage nearly twice as long as that to the nearest German port. The prize master's commission authorized him to take the vessel to the nearest American port and to lay her up. The German Ambassador in a letter of February 2, notified the Secretary of State of the vessel's arrival and of the intention of the commanding officer "to stay in an American port until further notice." (Cf. 10 AM. JOUR. INT. LAW (Supp., Oct., 1916), 387).

The modern practice of nations in dealing with prizes is for the captor to take them for condemnation before a prize court sitting in his country. It was formerly the custom for belligerents to bring prizes into neutral ports, although it was clearly recognized that such entry, except under special treaty stipulations to that effect, was accorded the belligerent not as of right, but as a privilege at the discretion of the neutral. DAVIS, OUTLINES OF INT. LAW, 261-262; MOORE, INT. LAW DIG., 983; WOOLSEY, INT. LAW, 267; HAUTE-

FEUILLE, DES DROITS ET DES DEVOIRS DES NATIONS NEUTRES EN TEMPS DE GUERRE MARITIME, 352. The whole trend of modern practice has been, however, to limit this entry very strictly to certain well-defined cases. "The modern practice of neutrals prohibits the use of their ports by the prizes of a belligerent, except in cases of necessity; and they may remain in the ports only for the meeting of the exigency. The necessity must be one arising from the perils of the seas, or need of repairs for seaworthiness, or provisions and supplies. * * * In the list of necessities, the general danger of a passage, from the vigilance or superiority of the enemy, it would seem, should not be included, although no decision on that precise point is known." WHEATON, INT. LAW (ed. Dana), 486-487 note; cf. also 2 OPPENHEIM, INT. LAW (2d. Ed.), 395-396; HALL, TREATISE ON INT. LAW, 623; DAVIS, op. cit., 261-262; MOORE, INT. LAW DIG., 982, 985. Such has also been the practice of the United States. MOORE, op. cit., 936, 937, 938. The modern attitude on this question is very clearly shown by the close restrictions of the provisions of Articles 21 and 22 of The Hague Convention XIII of 1907, adopted by a large majority of the nations, although not in force in the present war. The *Appam*, therefore, as not being according to the well-substantiated facts entitled thereto under any of the above exceptions of necessity, had, it is submitted, no right under the general principles of International Law to entry into a neutral American port.

The German Government rested its claim, however, upon what were conceived to be the special privileges conceded to her by the provisions of Article XIX of the Prusso-American Treaty of 1799, as renewed in 1828. Cf. Letters of Feb. 2 and Feb. 22, 1916, from German Ambassador to Secretary of State, in 10 AM. JOUR. INT. LAW (Supp., Oct., 1916), 387, 391; also telegram from German Government, ibid., p. 390.

This treaty, originally negotiated in 1785, was entered into in 1799 and renewed in 1828 by Prussia and the United States; and although there is in theory ground for the contention that treaties made by a component state of the German Empire prior to the formation of the latter are not binding upon the Empire, this Treaty has been frequently recognized as valid and rights claimed and obligations performed under it. (Statement of the German Foreign Secretary before the Reichstag, May 31, 1897.) Its validity was officially recognized by Prussia at the outbreak of the Civil War in 1861, by the United States and the North German Confederation in the Franco-Prussian War of 1870-1871, in the Lusitania Note of May 13, 1915, and in the Frye case in 1915. (Based on KRAUEL, EIN VOELKERRECHTLICHER STREITFALL, in KOHLER, ZEITSCHRIFT FUER VOELKERRECHT for January, 1916, pp. 11-19.) In *Terlinden* v. *Ames*, 184 U. S. 270, the Supreme Court recognized the continuous validity of treaties made by the United States and the component states of the German Empire, the political departments of both countries having previously decided such question in the affirmative. The *Appam*, therefore, as a German prize seeking entry into a neutral American port, was entitled to the enjoyment of such rights and privileges of entry and of such only as are granted and contemplated by the provisions of Article XIX of that Treaty.

The Treaty with Prussia was one of a series of commercial treaties made by the United States with the leading maritime states of Europe—with France in 1778, with Holland in 1782, with Sweden in 1783, with England in 1794. In these treaties, except that with Holland, the reception of prizes in the ports of the neutral is regulated by provisions of the same general tenor, the differences being in the main in phraseology. On August 28, 1801, President Jefferson wrote to Gallatin about the French Treaty, "The treaties give a right to armed vessels, *with their prizes,* to go where they please (consequently into our ports), and that these prizes shall not be detained, seized, nor adjudicated, but that the armed vessel may depart as *speedily as possible, with her prize,* to the place of her commission. * * * These stipulations admit the prizes to put into our ports in cases of necessity, or perhaps of convenience, but no right to remain if disagreeable to us; and absolutely not to be sold." MOORE, op. cit., VII. 936. It would seem, then, that the interpretation put by the Secretary of State upon Article XIX as providing only temporary asylum for prizes under convoy by the captor vessel is in strict accord, not only with the general practice of the United States, but also with the interpretation officially put by the Government upon similar treaty provisions from the beginning. Cf. Letters of March 2 and of April 7, 1916, from Secretary of State to German Ambassador, in AM. JOUR. INT. LAW, X, Supp., Oct., 1916, pp. 393-395, 401-403. The German Government protested against this "especialy strict interpretation" of the Treaty, urging the facile contention that the modern practice of naval warfare should modify the strict terms of the stipulation so as to permit entry of unconvoyed prizes in conformity with modern methods of sending prizes to the home port under a prize crew. German Memorandum of March 16, 1916, in AM. JOUR. INT. LAW, X, Supp., Oct., 1916, pp. 397-399. A treaty is in essence a bargain whereby the contracting parties seek to accommodate their aims and interests in such fashion as will secure to each the greatest amount of advantage possible. Provision is balanced against provision, and it is submitted that no unilateral extension of the strict terms of any provision can be admitted under the general principles of treaty construction (cf. WOOLSEY, INT. LAW, pp. 185-186), a restriction of all the greater force when it is borne in mind that the provision thus proposed to be extended in the face of an acceptance of over a century under the possibility and the right of abrogation on a year's notice at any time the strict provisions of the treaty should prove unsatisfactory, was in itself originally a modification of the practice, if not of the rule, of International Law, a practice whose aim and purpose have been but fortified and strengthened in the later development of that science.

The determination of political questions lies within the realm of the political department of the government, whether of the executive or legislative branch, and that decision is not subject to review by the courts. Cf. MOORE, op. cit., V. 241-242, and cases there cited. The Supreme Court in *Jones* v. *United States,* 137 U. S. 202 (SCOTT, CASES, p. 40), held that the determination of sovereignty by the political department was binding upon the judges, other officers, and citizens. Cf. other cases there cited. Other

cases are *The Prize Cases,* 2 Black, 665; *Fifield* v. *Ins. Co.,* 47 Pa. St. 166, 172 in Scott's Cases; also *Kennett* v. *Chambers,* 14 How. 38, where it was held that the decisions on foreign relations made by the political department were binding upon the country. (SCOTT, CASES, p. 728, 729.) The court held in *re Cooper,* 143 U. S. 472, 502-505 (MOORE, op. cit., V. 744), that there could be no judicial review of the action of the political department upon such questions, basing its opinion upon *Williams* v. *Suffolk Ins. Co.,* 3 Sumner, 270, and other cases there cited. In *North American Commercial Co.* v. *United States,* 171 U. S. 110, the court recognized the arbitral award and the correspondence of the government as binding upon it. In the matter of the interpretation of treaties the courts are bound by the known decisions of the political department; and this principle is more clearly seen where the interpretation put upon the treaty by the political department has been set forth in the course of diplomatic reclamation. In *Foster* v. *Neilson,* 2 Pet. 253, "the court refused to go into the merits of the treaty, holding itself bound by the decision of the political department of the government. * * * 'We think, then, however individual judges might construe the Treaty of St. Ildefonso, it is the province of the court to conform its decisions to the will of the legislature, if that will has been clearly expressed.'" SCOTT, CASES, pp. 75-76. Nor can the Supreme Court enforce a treaty, if the government decides to disregard it. *Botiller v. Dominguez,* 130 U. S. 238, and other cases there cited, in MOORE, op. cit., V. 243. In the principal case Waddill, J., said, "The weight that should be given to the opinion and ruling of the secretary of state * * * in construing the Prussian treaty, need not be dwelt upon * * * further than to say that it has special significance as a decision and ruling of the executive branch of the government, having to do with international matters, invoked by the German government, in this very matter." 234 Fed. 396. The interpretation put upon the Prussian Treaty by the Secretary of State was, therefore, binding upon the courts. Since by that interpretation the *Appam* had no right to entry under the circumstances, such entry consituated a violation of American neutrality; and the courts, called upon in the libel suits to take cognizance of the case, had to proceed to judgment accordingly.

"'When a captured vessel is brought or voluntarily comes *infra praesidia* of the neutral power, that power has the right to inquire whether its own neutrality has been violated by the capture, and if so it is bound to restore the property.' *La Estrella,* 4 Wheaton 298; *La Amistad de Rues,* 5 Wheaton 385; *Talbot* v. *Janson,* 3 Dallas 157; *Betsey Cathcart,* Bee. 292." HALL, INT. LAW, p. 625; cf. also HAUTEFEUILLE, op. cit., I. 360-361. In the past, it is true, but two main classes of such cases have come up for adjudication, captures in neutral territory, and captures by vessels fitted out in neutral ports (cf. HALL, op. cit., pp. 624-625; *La Santissima Trinidad,* 7 Wheaton 283); but it is submitted that it is the fact of the violation of neutrality—and not the manner of the violation, which is conceived to be a question of quite secondary importance—which entails the penalty. The Vice-Admiralty Court at Halifax held in the case of *The Chesapeake* that "for a

belligerent to bring an uncondemned prize into a neutral port to avoid recapture [as seems to have been the motive in the principal case] is such a grave offense against the neutral state that it ipso facto subjects the prize to forfeiture, and * * * the vessel should be restored to the owners on the payment of costs." MOORE, op. cit., VII. 937. The holding of the court was, therefore, in line with the rulings and practice of over a century.

Although the Supreme Court did not in the opinion handed down in the principal case expressly recognize that the interpretation put upon the Treaty by the political department of the government in the course of diplomatic reclamation was binding upon the courts, it is submitted that that principle governed in arriving at the decision. H. C. S.

ENJOINING AN ELECTION AT THE SUIT OF TAXPAYER.—It is commonly stated that equity has not power to enjoin an election. MCCRARY, ELECTIONS, 3rd Ed. §351. This statement cannot be taken without some qualification. When the election is being held under a valid law, the requirements of which are observed, there can be no doubt but that the injunction should be refused. The question in such a case is a poltical one and equity will not interfere to decide questions which are truly of a political nature. *Morgan* v. *Wetzel County Court,* 53 W. Va. 372, 44 S. E. 182; *Oden* v. *Barber,* 103 Tex. 449, 129 S. W. 602. But in cases where the election is to be held under an unconstitutional law, most of the cases hold that equity has jurisdiction to enjoin. *Mayor, etc. of Macon* v. *Hughes,* 110 Ga. 795, 36 S. E. 247; *Connor* v. *Gray,* 88 Miss. 489, 41 So. 186 (semble); contra, *Illinois* v. *Galesburg,* 48 Ill. 485. The question in such a case is certainly a judical one and is capable of being tried by a court of equity.

In a recent case, *Power* v. *Ratliff* (Miss. 1916), 72 So. 864, which was a combination of two suits to enjoin the submission to the vote of the people of a prohibition law and a law providing for the appointment of game wardens, the relief was denied. In both suits the plaintiffs contended that the constitutional amendment which allowed a referendum was void because not regularly passed. It was stated in the dissenting opinion that the amendment was clearly invalid because of the method of its adoption and this is tacitly admitted in the prevailing opinion, which however did not consider this point. The majority opinion disposes of the case upon two grounds: one, that these particular plaintiffs have not sufficient interest in the result to complain; two, that equity has no jurisdiction to grant the relief demanded. Having disposed of the first point, the decision on the second is unnecessary and is hence mere obiter dictum.

However, the question of jurisdiction is an interesting one. It is of course, well settled that equity will not enjoin the passing of an act by the legislature even though the act would be clearly unconstitutional if passed. *McChord* v. *Louisville and N. R. Co.,* 183 U. S. 483, 22 Sup. Ct. 165, 46 L. Ed. 289; *New Orleans Water Works Co.* v. *New Orleans,* 164 U. S. 471, 17 Sup. Ct. 161, 41 L. Ed. 518. This position is taken in order to prevent judicial interference with the functions of the legislature; there is also